No. 84-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,
Petitioner

v.

DIGIDYNE CORPORATION and FAIRCHILD CAMERA AND INSTRUMENT CORPORATION,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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1. As respondents describe this case, it presents a simple question—whether courts will honor verdicts of juries. The jury was instructed to determine whether Data General possessed market power; it found in the affirmative; that is that. But "market power" is a legal term of art. *See Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1556 & n.46 (1984) *("Hyde")*. The issue here revolves around questions such as what market power means, and how much is too much. The jury's verdict cannot settle these issues; they are questions of law.

Moreover, the Ninth Circuit did not decide this case solely on the basis of the jury's verdict. At critical points it disavows any reliance on the jury's findings.

Respondents maintain that the jury's verdict is supported because Data General's products are especially desirable to many customers and that these customers therefore would be willing to pay more for its operating system software than they would pay for the products of other firms that were less well adapted to their needs. For example, if Data General's products are especially well adapted to some tasks and customers, then Data General will have some very dedicated buyers, it will make a substantial profit, and it will have "discretion" over the price it charges (in the sense that it can always charge less than the highest price these customers would be willing to pay for the product they prefer). All of the evidence showing that it costs money and takes time for rivals to emulate Data General's products goes to this. But such evidence just emphasizes what no one denies—that Data General's products are different from those produced by other firms and will remain so until someone takes the time and bears the costs to emulate them. The costs of emulation may be high but no higher than the costs of creation.

Market power in antitrust means power over price in the sense that a firm can raise market prices at its discretion by cutting back its output. As the Court emphasized in *NCAA v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984) (*"NCAA"*), the central issue in an antitrust case is whether a firm can extract a monopoly price by reducing its output, thus injuring consumers. Respondents' method of analysis, however, does not show "market power" at all. It just shows that a firm with a better-than-average product can charge a higher-than-average price. If Papermate figures out how to make a pen write twice as long as its rivals', it can charge more than they for its pens. But this difference does not show the kind of power relevant to antitrust. Papermate could not charge more by reducing its output, and it could not charge more than twice its

rivals' price. That is, Papermate could not collect more for its innovation than the additional value it built into its products. All other pens would continue to compete with Papermate pens, limiting its ability to raise price. The price per word produced by all pens would be similar or identical.

The plaintiff in *Hyde* tried to establish market power using the same method as respondents here. He showed that East Jefferson General Hospital was uniquely attractive to some patients, that other patients would pay a premium because their bills were covered by insurance, and so on. The Court replied that such evidence does not establish the kind of market power that makes tying unlawful *per se*.

Here the jury, with all the evidence proferred by respondents, returned a general finding of market power without specifying the kind of power involved.[1] The district court held that a finding based on what was enunciated in *Hyde* and *NCAA*—the method appropriate to an antitrust case—would have been unsupported by the evidence because of various facts, including the vigorous competition among firms selling computational systems. Pet. App. at 40a-49a.

The court of appeals accepted respondents' erroneous method of proving *per se* liability. It held that Data General pos-

[1] Indeed, the jury's verdict was fundamentally ambiguous. As the district court pointed out, the jury defined as its principal market a "submarket" in "operating software which run with CPUs utilizing the NOVA instruction set." Finding No. 3, Petitioner's Appendix ("Pet. App.") at 34a. It also found both tying and tied "markets" comprised of "all general purpose minicomputers and microprocessors." Finding No. 1, *id.* It then found market power in a way that makes it "impossible to determine . . . whether the findings of economic power and appreciable restraint refer to the market or the submarket." *Id.* at 37a. Thus the jury may have found no more than that DG possesses the power to set the price of products in a submarket defined by its own brand name—a "power" that the supplier of any tradenamed product possesses. Because the Ninth Circuit decided the case on entirely legal grounds, it is unnecessary to pursue the full implications of this ambiguity.

sesses power in the sense that its products are especially attractive to many customers. It did not hold that Data General possesses power to raise prices by reducing output or that Data General possesses power in any relevant market of computer systems. To the contrary, the Ninth Circuit held that possession by the seller of such power in the relevant market "is sufficient to establish *per se* illegality, but it is not required." Pet. App. at 5a. The court of appeals also did not find—or hold that the jury *could* have found— that Data General possesses or exercised the power to raise the price of its tied package of hardware and software. To the contrary, the Ninth Circuit held the tie to be illegal *per se* "[e]ven assuming [Data General's] package of RDOS and [the] NOVA instruction set CPU was competitively priced." *Id.* at 18a.

The issue presented by this case thus is entirely one of law, and it is cleanly presented: Is evidence of power over price that shows only special attractiveness of a product enough to support *per se* condemnation? The Ninth Circuit removed from the case the factual issues labored by respondents. It removed these issues by (a) assuming that the price of the package Data General sold was competitive and (b) refusing to find power in a market of small computer systems. It *still* found the tie unlawful per se on the basis of the special attractiveness of Data General's products to some customers. As the Ninth Circuit summarized its own position: "we review the record not for what it may reveal as to [Data General's] position in a defined market in which [Data General's] RDOS was sold, but only to determine whether the jury reasonably could have concluded [that Data General's] RDOS was sufficiently unique and desirable to an appreciable number of buyers to enable [Data General] to force those buyers also to buy a substantial volume of [Data General's] NOVA instruction set CPUs they would have preferred not to buy." Pet. App. at 8a.

The Ninth Circuit declined to rest its decision on the kinds of factual issues respondents now present. It put its decision instead on a legal ground, which the Department of Justice has

accurately characterized as one that "simply ignores the holding and rationale of *Hyde*." Brief for the United States of America as Amicus Curiae in Support of Petition for Rehearing, Pet. App. at 118a. As the Department stated, the Ninth Circuit position "eliminates the need to prove market power to establish anticompetitive forcing" (*id.* at 119a), because it uses an invalid method of showing power over price. The court of appeals found market power from little more than Data General's ability to produce an especially desirable product that could not be quickly and costlessly emulated. The Department continued:

> [S]uch an analysis, by eviscerating the market power requirement of traditional tying case law, is clearly contrary to the central teaching of *Hyde*.
>
> The panel's decision also ignores the fact that the significant benefits of a competitive market economy appear not just in the form of low prices but also in the form of a wide variety of goods and services. . . . [T]he consumers of each producer's good would find that good unique and desirable relative to the other competing goods. But in the absence of market power, an individual seller's attempt to raise price . . . would cause a sufficient number of purchasers to change their opinion as to the unique desirability of that product and to switch to the alternatives. . . . In short, goods may be unique and desirable yet have no market power. Indeed, this is an accurate description of a very large percentage of the competitive markets that actually exist in today's economy. Under the rationale of the panel decision, however, packaged sales involving such 'unique and desirable,' albeit competitive, goods would be illegal *per se* so long as a substantial volume of the package is sold.

Pet. App. at 119a-20a (footnote omitted).

The United States thus shares our view that the decision of the Ninth Circuit rests on an erroneous legal footing and raises issues of substantial general importance.

2. Respondents belittle the practical importance of this case. They say that other sellers of computers do not use exactly the same practices as Data General (Brief of Respondents in Opposition at 20) and that the case is "*sui generis* . . . presenting a record of nonpareil scope and strength." *Id.* at 22. This mistakes our argument. The case is important because the legal rules established by the court of appeals affect the entire computer industry—and, as the Department of Justice points out, every industry with differentiated products—not because other firms use practices identical to those of Data General.[2] Seven firms making a large fraction of the industry's sales (other than IBM) have filed or joined in two *amicus* briefs in support of the petition. They believe that this decision substantially affects (or is likely to affect) the way they do business. The position of the United States, and the *amicus* filing by Mercedes Benz, establish the general applicability of this case outside the computer business. The importance of the principles at stake here calls for review.

3. Respondents offer little or no response to our argument that the Ninth Circuit's decision conflicts with the decisions of several other courts.

a. We argued that the Ninth Circuit's approach to market power conflicts with the approach of every other post-*Hyde* case. Petition at 11-12 & n. 7. Respondents reply that many of these other cases "honored jury verdicts" (Brief in Opposition at 22), so that there is no conflict. Many is not all. One case grants judgment for defendant notwithstanding a jury's verdict for the

[2] Even if the significance of this case depended on whether other computer manufacturers used practices identical or similar to Data General's, such that they would fall under the same per se condemnation, the record evidence referred to by respondents established "the industry practice of restricting the 'use of . . . operating systems to particular CPUs.' " (Brief of Respondents in Opposition at 20, quoting Petition at 10 n. 5.) What difference would it make to a customer that its use of a firm's operating system software is restricted to a particular CPU identified by ID number or by manufacturer's name?

plaintiff. *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284 (11th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3405 (Nov. 2, 1984)(No. 84-7 2). Other cases grant summary judgment for the defendant on facts showing the same sort of product differentiation as that involved here.[3]

b. Respondents do not answer our argument (Petition at 19-20) that the market the jury and the Ninth Circuit defined amounts to a "market" defined in terms based on Data General's products only, which is inconsistent with a line of cases requiring analysis of broader markets. Respondents appear instead to concede the point, emphasizing that Data General's power comes from the fact that it makes "a product so unique and so necessary to 80% of all of [its] customers." Brief of Respondents in Opposition at 19. This is just another way of saying that, as respondents and the Ninth Circuit portray the market, every firm has "market power" sufficient to make tying illegal per se if it sells a product that is deemed especially desirable by those who buy it.

c. We pointed out a conflict with *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir.), *cert. denied*, 459 U.S. 857 (1982), which holds that a plaintiff *must* establish that the price of the *package* is elevated, not just that the price of one component is elevated. Respondents dismiss *Kypta* as one in which the court found no "evidence of actual injury" (Brief in Opposition

[3] *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (No. 84-405) (no power as a matter of law; as respondents point out, this case alternatively held there was no tie); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030 (lst Cir. 1984)(again a holding of no power as a matter of law combined with alternative holding of no tie). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984)(no power as a matter of law even though product was factually unique and may account for more than 20% of the market; respondents do not even discuss this case, perhaps because the Fifth Circuit treated it as a monopolization case rather than as a tying case; the principles of "market power"—as opposed to substantive illegality—are nonetheless identical).

at 23 n. 28), which hardly distinguishes it. It held that a tie does not injure competition if the package price is competitive. This is as true here where the Ninth Circuit assumed the package price to have been competitive (Pet. App. at 18a), as in *Kypta*.

d. Finally, respondents seek to distinguish *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981), on the ground that it involves music, while this case involves computers. Brief in Opposition at 23 n. 28. Agreed, but this is a distinction without a difference. The Second Circuit held that a focus on buyers who find themselves "locked in" is the wrong one for antitrust, when there was ample competition for the initial sales. This is the locus of competition in the computer business, as it is in the music licensing business. The rationale of the case thus runs square against the grain of the Ninth Circuit's emphasis on what happens after the initial competition.

For these reasons, in addition to those given in the petition, the Court should grant the writ of certiorari.

Respectfully submitted,

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